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IN THE

Supreme Court of the United States

October Term, 1971

No. .....71 - 372

LAW RESEARCH SERVICE, INC. and
ELLIAS C. HOPPENFELD,

Petitioners,

against

BLAIR & CO., GRANBERY, MARACHE,
INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

LAW RESEARCH SERVICE, INC. and ELLIAS C. HOPPENFELD,

Petitioners,

against

BLAIR & CO., GRANBERY, MARACHE, INCORPORATED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, *The Chief Justice and Associate Justices of the Supreme Court of the United States*:

Petitioners, Law Research Service, Inc. and Ellias C. Hoppenfeld respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 14th, 1971, affirming the judgments of the United States District Court for the Southern District of New York, entered on October 8th, 1970, which directed contribution between intentional joint tortfeasors, without any statute so providing.

Opinions of the Court Below

The opinion of the Court of Appeals is reported in 442 F. 2d 1346. It is printed in Appendix "D", hereto, *infra*,

p. 24. The opinion of the District Court for the Southern District of New York is reported in 318 F. Supp. 955 It is printed in Appendix "B", hereto, *infra*, p. 16.

Jurisdiction

The judgment of the Court of Appeals was entered on June 14th, 1971. The jurisdiction of this Court is invoked under Title 28 U. S. C. §1254(1).

Question Presented

Whether or not a federal court, can direct contribution between intentional joint tortfeasors under the Securities Act of 1933 and the Securities Exchange Act of 1934, when the sections under which the underlying judgment was awarded makes no provision for contribution and there is no state statute authorizing the recovery of contribution in such type case?

Statutory Provisions Involved

The pertinent statutory provisions are printed in Appendix "A", *infra*, p. 13.

Statement of the Case

The underlying lawsuit was brought in the United States District Court for the Southern District of New York, by thirteen plaintiffs under the anti-fraud provisions of the Securities Act of 1933 (the 1933 Act) and the Securities Exchange Act of 1934 (the 1934 Act) against Law Research Service, Inc. (LRS) and Ellias C. Hoppenfeld (Hoppenfeld), the petitioners herein and Blair & Co., Granbery, Marache, Incorporated (Blair), the respondent herein, all of whom were the defendants therein.

A. Jurisdiction

The jurisdiction of the District Court was founded under §22 of the 1933 Act, 15 U. S. C. §77v. and §27 of the 1934 Act, 15 U. S. C. §78aa. as amended.

B. The Underlying Judgment

The complaint alleged violations by all of the defendants of §17(a) of the 1933 Act, 15 U. S. C. §77(q.)(a) [Appendix "A", *infra*, p. 13], §10(b) of the 1934 Act, 15 U. S. C. §78j.(b) [Appendix "B", *infra*, p. 14], and the commission of common law fraud. Additionally, the complaint alleged violations by Blair of §12(2) of the 1933 Act, 15 U. S. C. §77l.(2) and §15(c) of the 1934 Act, 15 U. S. C. §78o.(c).

The jury found that all of the defendants had violated §§17(a) and 10(b), but had not committed common law fraud. It also found that Blair had violated §§12(2) and 15(c). The jury awarded the plaintiffs compensatory damages against all of the defendants under §§17(a) and 10(b) [1] and punitive damages under §17(a) against Blair and Hoppenfeld. No punitive damages were awarded against LRS. The opinion of the trial court is reported in 287 F. Supp. 188, S. D. N. Y. 1968 (*Globus* v. *Law Research Service, Inc.*).

The defendants then appealed to the United States Court of Appeals for the Second Circuit, which affirmed the judgment for compensatory damages and reversed so much of the judgment as awarded punitive damages against Blair and Hoppenfeld under §17(a). The opinion of the Court of Appeals is reported in 418 F. 2d 1276, 2nd Cir. 1969 (*Globus* v. *Law Research Service, Inc.*). Plaintiffs then petitioned this Court for certiorari which was denied 397 U. S. 913 (1970).

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[1] The jury found all of the defendants jointly and severally liable and implicit in such finding was that each of such defendants was an *intentional* joint tortfeasor (287 F. Supp. at 193; 418 F. 2d at 1288, 1291).

C. Blair's Motion for Contribution

On May 8th, 1970 Blair, being jointly and severally liable under the judgment for compensatory damages paid it in full. On June 24th, 1970 Blair demanded contribution on a pro rata basis of one third each from both LRS and Hoppenfeld. On July 24th, 1970 Blair moved the District Court for a judgment for contribution against both LRS and Hoppenfeld.

D. The Decision of the District Court Granting Contribution

On October 7th, 1970, Judge Marvin E. Frankel granted Blair's motion for contribution and directed the Clerk of the Court to enter judgments against LRS and Hoppenfeld, each in the amount of one-third of the amount of the judgment paid by Blair to the plaintiffs. The Clerk of the United States District Court for the Southern District of New York, entered such judgments on October 8th, 1970 (Appendix "C", *infra,* p. 22).

In granting Blair's motion for judgments of contribution against LRS and Hoppenfeld, Judge Frankel concluded that "the general drift of the law today is toward the allowance of contribution among joint tortfeasors" (Appendix "B", *infra,* p. 19) and "that contribution should be permitted" even though Section 10(b) does not "contain express provisions for contribution among intentional wrongdoers" (Appendix "B", *infra,* p. 20) since LRS and Hoppenfeld "may not effectively nullify their 'liability for compensatory damages' by leaving the whole of the burden to" Blair (Appendix "B", *infra,* p. 21).

The Court of Appeals affirmed Judge Frankel's award of contribution in open court "on the basis of his opinion, reported at 318 F. Supp. 955 (1970)" agreeing "with both his result and reasoning" (Appendix "D", *infra,* p. 26).

Reasons Relied on for the Allowance of the Writ

The District Court's decision ignores and is in conflict with the common law, the teachings and the decisions of this Court and the law of the state of the forum.

The jury found all three defendants jointly and severally liable as intentional joint tortfeasors under §17(a) of the 1933 Act and §10(b) of the 1934 Act.[2] Neither §17(a) or §10(b) makes any provision for contribution between joint tortfeasors nor is there any statute of the State of New York, the State of the forum authorizing the recovery of contribution in such type cases.[3]

It has been firm established since 1799 that courts exercising a common law jurisdiction cannot on their own initiative create an enforceable right of contribution as between intentional joint tortfeasors. The common law rule that there shall be no contribution between intentional tortfeasors evolves from *Merryweather* v. *Nixan,* 8 Term Rep. 186, 101 Eng. Rep. 1337 (K. B. 1799).[4] In the United

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[2] 287 F. Supp. at 192, 193; 418 F. 2d at 1283, 1288.

[3] Both §§17(a) and 10(b) are anti-fraud statutes, the violation of which requires scienter on the part of the violators [Appendix "A", *infra,* pp. 13, 14; *Globus* v. *Law Research Service, Inc.,* 418 F. 2d at 1291]. The only New York Statute authorizing contribution between joint tortfeasors is §1401 of the Civil Practice Law and Rules, which limits such contribution to actions for "personal injury or property damage" [Appendix "A", *infra,* p. 15]. §1401 is not available in actions for fraud or deceit (*Valley Rolling Mills, Inc.* v. *Feldman,* 264 App. Div. 717, 34 N. Y. S. 2d 832, 1st Dep't. 1942; cf. 2A *Weinstein-Korn-Miller, New York Civil Practice* ¶1401.04).

[4] The plaintiff and defendant in that case had injured a mill by taking or damaging its machinery and the plaintiff having satisfied the judgment of the mill owner sued for contribution. The trial judge non-suited on the ground that "no contribution could by law be claimed by joint wrongdoers." On appeal, affirming the trial court, Kenyon, C. J. stated "that he had never before heard of such an action being brought, where the former recovery was for a tort." In 1799 the word "tort" was used only to describe wrongs of a willful or intentional charatcer. (cf. *Knell* v. *Feltman,* D. C. Cir. 1949, 174 F. 2d 662).

States this common law rule emerges from your decision in *Union Stock Yards Co.* v. *Chicago B. & Q. R. Co.*, 196 U. S. 217 (1905) when you held 196 U. S. at 224 that:

> ". . . the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damage for the wrong done."

Almost fifty years after the *Union Stock Yard's* case in *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282 (1952) this Court made it clear that it had no intention of departing from the common law rule against contribution when you held 342 U. S. at 285 that:

> "In the absence of legislation courts exercising a common law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors.
>
> • • •
>
> "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action."

Recently in *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co., Ltd.*, 394 U. S. 404 (1969) in permitting impleader of a stevedoring contractor by a shipowner this Court indicated how deep-rooted in our jurisprudence is the common law rule against contribution when you stated 342 U. S. at 285 that:

> "This ruling is no wise a departure from our decision in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U. S. 282, 285, 72 S. Ct. 277, 280, 96 L. Ed. 318, that we would not 'fashion new

judicial rules of contribution' between the shipowner and the stevedoring contractor as joint tortfeasors."

Despite the teachings of the common law and this Court, Judge Frankel on his "own initiative" attempted to fashion a new judicial rule of contribution under the 1933 and 1934 Acts. To reach this most undesirable result he completely ignored the deep rooted doctrine of this Court that you "would not fashion new judicial rules of contribution" even in those instances where you "would feel free to do so" and that any changes in the rules of contribution "should await congressional action."[5]

Judge Frankel departed from "traditional common law" on the ground that "the general drift of the law today is toward the allowance of contribution among joint tortfeasors."[6] However none of the cases relied on by Judge Frankel allowed contribution between intentional tortfeasors without statutory authorization and only permitted contribution to an unintentional tortfeasor. Specifically he relied on an isolated District Court case in Colorado[7] which held that:

> "Those sections of the [securities acts] which expressly provide for civil liability contain express provisions for contribution among intentional wrongdoers" and that "[s]ince the specific liability provisions of the Act provide for contribution, it

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[5] *Halcyon Lines et al.* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. at 285 where you pointed out that "courts exercising jurisdiction in maritime affairs have felt freeer than common law courts in fashioning rules", however, you refused to fashion new judicial rules of contribution under maritime law.

[6] 318 F. Supp. at 957 [Appendix "B", *infra*, p. 19].

[7] *de Haas* v. *Empire Petroleum Company*, D. Colo. 1968, 286 F. Supp. 809, 815-816.

> appears that contribution should be permitted when liability is implied under Section 10(b)."[8]

The specific liability provisions which provide for contribution and relied upon in the *deHaas* case and by Judge Frankel are §11 of the 1933 Act, 15 U. S. C. §77k [Appendix "A" *infra*, p. 13], and §§9 and 18 of the 1934 Act, 15 U. S. C. §78i and §78r [Appendix "A" *infra*, pp. 14, 15]. However, there are other sections of the Securities Acts which expressly provide for civil liability without making any provision for contribution.[9] In view of such fact "and because Congress while acting in the field has stopped short of approving the rule of contribution urged" by Blair it was "inappropriate" and beyond the power of the court in the *deHaas* case and the District Court herein, both of which were courts exercising a common law jurisdiction "to do so".[10]

Since there is no federal statute providing for contribution between joint tortfeasors under §§17(a) and 10(b) the law which should have been applied by Judge Frankel and the Court of Appeals, is the law of the forum state in which the prohibited acts occurred, the State of New York.[11] The law of the State of New York closely parallels the teachings of this Court, as set forth by the New York Court of Appeals, its highest Court, in *McFall* v. *Compagnie Maritime Belge (Lloyd Royal) S. A.*, 304 N. Y. 314, 107 N. E. 2d 463 (1952) when in words strikingly

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[8] 318 F. Supp. at 958 [Appendix "B", *infra*, p. 20].

[9] §12 of the 1933 Act, 15 U. S. C. §771 and §20 of the 1934 Act, 15 U. S. C. 78t, which provide for civil liability without contribution. In addition §15 of the 1933 Act 15 U. S. C. §77o provides for civil liability of controlling persons under both §11 providing for contribution and under §12 which makes no provision for contribution.

[10] *Halcyon Lines et al.* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. at 287.

[11] *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938); *Hooper* v. *Mountain States Securities Corp.*, 5th Cir. 1960, 282 F. 2d 195, 205; *de Haas* v. *Empire Petroleum Company*, 10th Cir. 1970, 435 F. 2d 1225.

similar to your holding in *Halcyon Lines, Inc.* v. *Haenn Ship Ceiling & Refitting Corp.*,[12] it held in 304 N. Y. at 327 that:

> "In the absence of statutory provision one of several wrongdoers who has been compelled to pay damages for the wrong committed, cannot obtain contribution from the others who participated in the commission of the wrong. Such is the rule recognized not only by the courts of this State, see, eg., Fox v. Western New York Motor Lines, 257 N. Y. 305, 178 N. E. 289, 78 A. L. R. 578, but by the federal courts, see Union Stockyards Co. v. Chicago, B & Q. R. Co., 196 U. S. 217, 224, 25 S. Ct. 226, 49 L. Ed. 453."

The only New York Statute which provides for contribution between joint tortfeasors is §1401 of the Civil Practice Law and Rules which applies only when the original action was one in which money damages were recovered "for a personal injury or for property damage" (Appendix "A", *infra*, p. 15) and "does not apply to a judgment for fraud and deceit".[13]

There being no New York statute which provides for contribution between intentional joint tortfeasors for violation of the anti-fraud sections of the Federal Securities Acts, wherein Congress has not specifically provided such a right, the attempt of Judge Frankel and the Second Circuit to fashion a new judicial rule of contribution on their own initiative to create an enforceable right of contribution betwen joint tortfeasors under the non-contribution sections of the Federal Securities Acts ignores and is in conflict not only with the common law and

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[12] 342 U. S. at 285.

[13] *Valley Rolling Mills* v. *Feldman, supra;* Footnote 3, *ante* p. 5.

the decisions of this Court, but also with the firmly established New York rule.[14]

Although the Federal Securities Acts have been in effect for over 35 years and the anti-fraud provisions of both the 1933 and 1934 Acts have been the subject of much litigation involving civil liability under both the specific liability sections and the implied liability sections,[15] there does not appear to be any other reported case, other than the opinions of the lower courts herein, which *actually* permitted the entry of a judgment for contribution between

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[14] The pattern presented in the instant case is very similar to that in *State Mutual Life Assurance Company of America* v. *Peat, Marwick, Mitchell & Co.*, S. D. N. Y. 1969, 49 F. R. D. 202. The defendant was charged with civil liability under §§17(a) and 10(b), the alleged violations having occurred in the State of New York, and maintained that it had a right to contribution from the third party defendant. The motion to strike the third party complaint was granted. At pp. 212, 213, the Court said:

> "Admittedly, there is authority in another district for recognizing a right to contribution in cases brought under Section 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. §78j(b). de Haas v. Empire Petroleum Co., 286 F. Supp. 809 (D. Colo. 1968). *But I feel that to abandon the firmly established New York rule when Congress has not specifically provided such a right would run afoul of the Supreme Court's confessed dislike of judicial attempts to fashion new rules of contribution.* Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U. S. 282, 285, 72 S. Ct. 277, 96 L. Ed. 318 (1952)" [Emphasis supplied].

[15] §§17(a) and 10(b) are both implied liability sections and at least with respect to §10(b) it has consistently been held that a suit for damages may be maintained for its violation (*Fratt* v. *Robinson*, 9th Cir. 1953, 203 F. 2d 627; *Fischman* v. *Raytheon Mfg. Co.* 2nd Cir. 1951, 188 F. 2d 783; *Kardon* v. *National Gypsum Co.*, E. D. Pa. 1946, 69 F. Supp. 512; *deHaas* v. *Empire Petroleum Company*, D. Colo. 1969, 302 F. Supp. 647) and several courts have indicated that a private right of action will lie for the violation of §17(a) (*Globus* v. *Law Research Service, Inc.*, 2nd Cir. 1969, 418 F. 2d 1276, 1283, certiorari denied 379 U. S. 913 (1970).

intentional joint tortfeasors under a section of the Acts which makes no provision for contribution.[16]

It is important that the decision of the District Court and the Court of Appeals in the instant case be reviewed and reversed since the Court of Appeals in affirming the District Court has decided a Federal question in a way in conflict with applicable decisions of this Court, has decided an important question of state law in a way in conflict with applicable state law and has so far sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.[17]

Moreover, the issue herein presented is of great importance to both Federal and State courts, which administer actions for civil liabilities brought under the Federal Securities Acts [18] who are now faced with the lower courts' decision herein which attempts to fashion a new judicial rule of contribution on their own initiative to create an enforceable right of contribution between joint tortfeasors under the non-contribution sections of the Federal Securities Acts, which ignores and is in conflict not only with the common law and the decisions of this court, but also with firmly established state law. Unless reviewed and

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[16] The *deHaas* opinion relied upon by Judge Frankel only involved a motion of the third party defendant for summary judgment dismissing the third party complaint which was denied on the ground that a genuine issue of fact existed on the "question of contribution" (286 F. Supp. at 815). However, the opinion of the District Court after the trial (1969, 302 F. Supp. 647) and the subsequent opinion of the 10th Circuit (1970, 435 F. 2d 1223) clearly indicate that there was no judgment for contribution against the third party defendant.

[17] Rules of the United States Supreme Court, Rule 19.

[18] The state courts have concurrent jurisdiction with the district courts to enforce any liability under the 1933 Act, §22, 15 U. S. C. 77v.

reviewed by this Court, this new judicial rule of contribution fashioned by Judge Frankel on his own initiative could well flow over into the general field of tort law thereby destroying the long rooted doctrine which has existed since 1799 that courts exercising common law jurisdiction may not create an enforceable right of contribution as between joint tortfeasors without statutory enactment providing for such contribution.

CONCLUSION

For the foregoing reasons, it is urged this Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, N. Y.
September 10th, 1971

Respectfully submitted,

Gabriel I. Levy,
Attorney for Petitioners.

APPENDIX "A"

Statutes

28 U. S. C. §1254(1)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Securities Act of 1933

Section 11(f), 15 U. S. C. §77k.(f)

> "All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation."

Section 17(a), 15 U. S. C. 77q.(a)

> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly.
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission

to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Securities Exchange Act of 1934.

Section 9(e), 15 U. S. C. 78i.(e)

"* * *. Every person who becomes liable to make any payment under this sub-section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment."

Section 10(b), 15 U. S. C. §78j.(b)

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or any facility of any national securities exchange.

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Appendix "A"

Section 18(b), 15 U. S. C. §78r.(b)

> "Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment."

State of New York, Civil Practice Law and Rules, §1401.

> "Where a money judgment has been recovered jointly against defendants in an action for a personal injury or for property damage, each defendant who has paid more than his pro rata share shall be entitled to contribution from the other defendants with respect to the excess paid over and above his pro rata share; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his own pro rata share of the entire judgment. Recovery may be had in a separate action, or a judgment in the original action against a defendant who has appeared may be entered on motion made on notice in the original action."

APPENDIX "B"

The Opinion and Order of the District Court

GLOBUS, INC., *et al.*,

Plaintiffs,

v.

LAW RESEARCH SERVICE, INC. and ELLIAS C. HOPPENFELD,

Defendants,

and

BLAIR & CO., GRANBERY, MARACHE, INCORPORATED,

Defendant and Third-Party Plaintiff,

v.

PAUL WIENER,

Third-Party Defendant.

No. 65 Civ. 1694.

United States District Court,

S. D. New York.

Oct. 7, 1970.

Mudge, Rose, Guthrie & Alexander, New York City, for Blair & Co., Granbery, Marache, Inc.; Milton Black, Thomas Esposito, New York City, of counsel.

Julien, Glaser, Blitz & Schlesinger, New York City, for Law Research Service, Inc., and Ellias Hoppenfeld; Alfred S. Julien, New York City, of counsel.

Appendix "B"

FRANKEL, District Judge.

In this lawsuit, a prolific generator of nice questions, plaintiff purchasers of securities have recoved a judgment under the 1933 and 1934 Securities Acts, have been paid a reduced amount allowed by a modification on appeal, and have finally gone hence. There remains a dispute as to whether one defendant, Blair & Co., Granbery, Marache, Incorporated (Blair), having paid in full the amount of the judgment, may recover contribution from the two defendants—Law Research Service, Inc. (LRS), and Ellias C. Hoppenfeld—held jointly and severally liable with it. The underlying dispute and its outcome have been fully recounted in an opinion by Judge Mansfield, which held, *inter alia,* that there could be no award of indemnity to Blair, 287 F.Supp. 188 (S.D.N.Y.1968), and an opinion of the Court of Appeals, 2 Cir., 418 F.2d 1276 (1969), affirming on that and all other subjects except punitive damages, which it ruled unavailable under §17(a) of the 1933 Securities Act, 15 U.S.C. §77q(a), as well as under §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b).[1] For our post-satisfaction purposes, the introductory summary of the case from the latter opinion, at 1278-1280, is enough:

> "The plaintiffs * * *, purchasers of the stock of * * * Law Research Services, Inc. * * *, initiated this action against LRS, its president Ellias C. Hoppenfeld, and the underwriter of LRS's public stock offer, Blair & Co. * * *. They contended that the (defendants) violated §17(a) of the Securities Act of 1933, §10(b) of the Securities Exchange Act of 1934, * * * and also committed common law fraud. The essence of their charge [was] that the

[1] Plaintiffs' petition for certiorari was denied, 397 U.S. 913, 90 S.Ct. 913, 25 L.Ed.2d 93 (1970).

offering circular prepared in connection with LRS's offer to sell 100,000 shares of its stock to the public under Regulation A of the Securities and Exchange Commission * * * was misleading since it prominently featured an attractive contract between LRS and the Sperry Rand Corp. (Sperry Rand) while failing to refer to a dispute between the two companies which had led Sperry Rand to terminate some of its services to LRS and in turn caused LRS to file suit against Sperry Rand. Moreover, the plaintiffs contended that Blair's actions violated §12(2) of the 1933 Act * * *.

"Judge Mansfield presided over a ten-day trial of these claims, to a jury in the Southern District of New York. The jury returned a verdict in favor of Blair, LRS and Hoppenfeld on the common law fraud claim but also decided that all three had violated both the Securities Act of 1933 and the Securities Exchange Act of 1934. Accordingly, the jury awarded compensatory damages to all plaintiffs totaling $32,591.14 and punitive damages against Hoppenfeld in the amount of $26,812.06 and Blair in the amount of $13,000, based on the violation of §17(a) of the 1933 Act.

"The jury was also called upon to deal with a cross-claim asserted by Blair against LRS, which rested on an indemnity clause included in the underwriting agreement, and against Hoppenfeld and a third-party defendant, Paul Wiener, Secretary-Treasurer of LRS, sounding in tort. At the same time, LRS and Hoppenfeld asserted a cross-claim against Blair, grounded on the same indemnity agreement. On all these cross-claims, the jury found for Blair.

"Blair and Hoppenfeld then moved unsuccessfully to have Judge Mansfield set aside the award

> of punitive damages. LRS, Hoppenfeld and Wiener, however, moved successfully to set aside the verdict on the cross-claims for indemnity and the entry of judgment, pursuant to Fed.R.Civ.P. 50(b). Judge Mansfield's careful and thorough opinion of July 19, 1968 is reported at 287 F.Supp. 188. In sum therefore, LRS, Hoppenfeld and Blair appeal[ed] from the award of damages to appellees and Blair appeal[ed] from the Judgment on the cross-claims and third-party action."

As has been mentioned, the judgment in its form following the appeal left Blair, LRS and Hoppenfeld jointly and severally liable to plaintiffs. The liability was for compensatory damages only. Blair, for reasons that are in part of interest now and are considered below, was held barred from recovering on its indemnity agreement with LRS. In substance and effect, while they argued before and continue to argue now about the degrees of their fault, they stood equally culpable and equally responsible.

Nevertheless, Blair alone, on May 8, 1970, paid plaintiffs the full amount of the judgment, plus interest and costs, or a total of $36,888.59, reserving any rights it might have to contribution from the others. When LRS and Hoppenfeld refused to contribute, Blair brought on the motion now before the court seeking judgment against them for one-third each of the sum paid to plaintiffs. The motion will be granted for reasons which follow.

(1) Departing from the rugged flintiness of traditional common law, the general drift of the law today is toward the allowance of contribution among joint tortfeasors. See, e. g., Gomes v. Brodhurst, 394 F.2d 465 (3rd Cir. 1968); Huggins v. Graves, 337 F.2d 486 (6th Cir. 1964); Knell v. Feltman, 85 U.S.App.D.C. 22, 174 F.2d 662 (1949); Bedell v. Reagan, 159 Me. 292, 192 A.2d 24 (1963); Best v. Yerkes,

247 Iowa 800, 77 N.W. 2d 23 (1956); Koenigs v. Travis, 246 Minn. 466, 75 N.W.2d 478 (1956); State Farm Mutual Automobile Ins. Co. v. Continental Cas. Co., 264 Wis. 493, 59 N.W.2d 425 (1953); Davis v. Broad St. Garage, 191 Tenn. 320, 232 S.W.2d 355 (1950); Quatray v. Wicker, 178 La. 289, 151 So. 208 (1933); Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 A. 231 (1928); N.Y. CPLR §1401 (1964); N.J.Rev.Stat. §2A:53A (1952); Pa.Stat.Ann. tit. 12 §§2082-2089 (1951); Md.Ann.Code art. 50, §§16-24 (1951). See generally, Prosser, Law of Torts, §47 (3rd Ed. 1964); Comment, Contribution Among Joint Tortfeasors, 44 Tex.L.Rev. 326, 326 n. 5 (1965) (cataloguing 24 States which have enacted statutes allowing contribution).

(2) More specifically, the securities acts underlying this case point clearly to the result Blair seeks.[2] As Judge Doyle pointed out in the *de Haas* case, *supra* note 2 at 815-816,

> "those sections of the [securities acts] which expressly provide for civil liability contain express provisions for contribution among intentional wrongdoers. [Citing §11 of the 1933 Act, 15 U.S.C. §77k, and §§9 and 18 of the 1934 Act, 15 U.S.C. §§78i and 78r.] Since the specific liability provisions of the Act provide for contribution, it appears that contribution should be permitted when liability is implied under Section 10(b). III Loss, Securities Regulation 1739-40, n. 178 (1961)."

This is simply a pertinent application of the general principle that the two statutes are to be administered *in pari materia*. E. g., *Globus* v. *Law Research Service, Inc.*, *supra*, 418 F.2d at 1286.

---

[2] There is no basis for doubting that the subject of contribution, like indemnity (as has been held in this case), is governed here by federal law. See, e. g., *de Haas* v. *Empire Petroleum Company*, 286 F. Supp. 809, 815-816 (D.Colo.1968).

Appendix "B"

(3) The prior decisions of Judge Mansfield and the Court of Appeals denying Blair's claim to indemnity support Blair's position now. A central ground for the ruling on indemnity was the judgment that allowing such means of absolution would dilute the deterrent impact of the securities laws, which seek "to encourage diligence, investigation and compliance with the requirements of the statute by exposing issuers and underwriters to the substantial hazard of liability for compensatory damages." *Id.* at 1289. The shoe is now on the other foot. If not identical, the mode of escape sought by LRS and Hoppenfeld is objectionable on substantially similar grounds. They may not effectively nullify their "liability for compensatory damages" by leaving the whole of the burden to the more prompt and diligent party with which they have been cast in joint and several liability.

There is an argument by LRS and Hoppenfeld that Blair should be compelled to proceed by a plenary action, not by motion. The reason is said to be that a law firm and auditors involved in the offering that led to the lawsuit should be brought in because they must share the liability. The argument is frivolous. The law firm and auditors were never brought in when Blair sought indemnity from its two present opponents. The law firm and auditors are not liable under the judgment as joint tortfeasors.

Other contentions in opposition to the motion, still less weighty, have been considered and rejected.

Blair's motion is granted, The Clerk of the Court will enter judgments for Blair against LRS and Hoppenfeld, each in the amount of $12,296.19 (the shares as computed by Blair), plus interest from May 8, 1970.

It is so ordered.

APPENDIX "C"

The Judgments of the District Court for Contribution

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

GLOBUS INC., BARBARA D'AMATO and MORTON GLOBUS, on behalf of themselves and all others similarly situated,

against

BLAIR & CO., GRANBERY, MARACHE INC., LAW RESEARCH SERVICE, INC., & ELIAS C. HOPPENFELD,

Defendants,

BLAIR & CO., GRANBERY, MARACHE INC.,

Defendant & Third/Party Pltff,

against

PAUL WIENER,

Third/Party Defendant.

U. S. District Court
Filed Oct. 8, 1970 S. D. of N. Y.

65 Civil 1694

Judgment

#70,993

The defendant/third/party plaintiff, Blair & Co., Granbery, Marache Incorporated having moved the Court for

judgment against the defendants Law Research Service, Inc., and Elias C. Hoppenfeld, for ⅓ each of the sum paid to plaintiff, Globus, Inc., et al., and the said motion having come on to be heard before the Honorable Marvin E. Frankel, United States Judge, and the Court thereafter on October 7, 1970, having handed down its opinion in favor of the defendant third party plaintiff, directing the Clerk to enter judgment, it is,

ORDERED, ADJUDGED AND DECREED: That defendant third party plaintiff, Blair & Co., Granbery, Marache Incorporated, have judgment against the defendants, Law Research Service, Inc., Elias C. Hoppenfeld, each in the amount of $12,296.19, plus interest from May 8, 1970.

Dated: New York, N. Y.
October 8, 1970

s/ JOHN LIVINGSTON
Clerk

APPENDIX "D"

Decision of the United States Court of Appeals for the Second Circuit Affirming the Judgments for Contribution

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 461—SEPTEMBER TERM, 1970.

(Argued June 14, 1971 Decided June 14, 1971.)

Docket No. 35861

MARTIN GLUCK, BARBARA D'AMATO, JOHN JACOBOWSKI and ELSIE JACOBOWSKI (jointly), ALFRED OPPENFELL, CONRAD TAPS, ROSE SLATTUS, JACK STEINPINK and STELLA STEINPINK (jointly), JACK STEINPINK, HAROLD ALENICK, CECILE GREENBERG and MURIEL PLOTKIN (jointly), BETTY SIMON, HARRY BALTERMAN and CHARLES SEMENTZ, JR.,

Plaintiffs,

—v.—

LAW RESEARCH SERVICE, INC. and ELLIS C. HOPPENFELD,

Defendants-Appellants,

and

BLUE & CO. (GREENBERG, MARAINE, INCORPORATED,

Defendant-Appellee and Third-Party Plaintiff,

—v.—

PAUL WIENER,

Third-Party Defendant.

Appendix "D"

Before:

MOORE and KAUFMAN, *Circuit Judges*, and TIMBERS, *District Judge.**

Appeal from judgments of the United States District Court for the Southern District of New York, Marvin E. Frankel, *Judge*, awarding contribution to Defendant-Appellee arising out of Appellants' and Appellee's joint and several liability for violations of the securities laws.

Affirmed.

ALFRED S. JULIEN (Julien, Glaser and Blitz, New York, N. Y.), *for defendants-appellants Law Research Service, Inc. and Ellias C. Hoppenfeld.*

MILTON BLACK (Thomas R. Esposito, Mudge Rose Guthrie & Alexander, New York, N. Y., of counsel), *for defendant-appellee.*

PER CURIAM:

We affirmed in open court Judge Marvin E. Frankel's award to Blair & Co., Granbery, Marache, Inc. (Blair) of contribution in the amount of one-third each from Law Research Service, Inc. (LRS) and Ellias C. Hoppenfeld (Hoppenfeld), Blair's co-defendants in an earlier stage of these proceedings.

In *Globus* v. *Law Research Service, Inc.*, 418 F.2d 1276 (1969), we affirmed a judgment entered against Blair, LRS, and Hoppenfeld for their joint and several liability pursuant to §17(a) of the Securities Act of 1933, 15 U.S.C.

* Chief Judge of the District of Connecticut, sitting by designation.

Appendix "D"

§77q(a) and §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) for failing to disclose material facts in connection with a public offering of the stock of LRS. 287 F. Supp. 188 (1968). Blair subsequently satisfied the judgment and by a motion in the District court sought to compel LRS and Hoppenfeld to pay their pro-rata shares of the judgment.

Judge Frankel awarded contribution. We agree with both his result and reasoning and affirm the judgment on the basis of his opinion, reported at 318 F. Supp. 955 (1970).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 372

LAW RESEARCH SERVICE, INC.
and ELLIAS C. HOPPENFELD,

Petitioners,

—against—

BLAIR & CO., GRANBERY MARACHE, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI ON BEHALF OF RESPONDENT BLAIR & CO., GRANBERY MARACHE, INC.

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Attorneys for Respondent,
Blair & Co., Granbery Marache
Incorporated

Of Counsel:
THOMAS R. ESPOSITO

Dated: October 13, 1971

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IN THE

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LAW RESEARCH SERVICE, INC.
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—against—

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI ON BEHALF OF RESPONDENT BLAIR & CO., GRANBERY MARACHE, INC.

Respondent Blair & Co., Granbery Marache Incorporated ("Blair") files this brief in opposition to the petition for a writ of certiorari filed by petitioners Law Research Service, Inc. ("Law Research") and Ellias C. Hoppenfeld ("Hoppenfeld") to review a judgment of the Court of Appeals for the Second Circuit rendered on June 14, 1971.

Question Presented

Whether review on petition for certiorari by this Court is merited in this case wherein three co-defendants have been held jointly and severally liable in a civil action under

[illegible] of the Securities and Exchange Act of 1934 and one of the three who was compelled to pay the entire judgment, obtaining contribution by motion from the other two, where a state statute permits a motion for contribution after judgment.

Statement of the Case

Elliot Hoppenfeld in the early 1960's conceived the idea of marketing computerized legal research. In 1963 Hoppenfeld founded Law Research Service, Inc. For this purpose and operated its predecessor (Appx. p. 6a).*

In 1965 it was decided to make a public offering of stock in Law Research. Bear was engaged as underwriter, and an offering circular was prepared. In the underwriting agreement entered into on March 15, 1965, Law Research agreed to indemnify Bear against all claims insofar as they arose out of an untrue statement or omission of material fact in the offering circular (Appx. p. 6a).

Sperry Rand Corp. ("Sperry Rand") had previously agreed to provide computer services to Law Research by a long-term contract. A dispute over payment arose between Sperry Rand and Law Research and Sperry Rand discontinued its services. Law Research then filed a complaint for breach of contract (Appx. p. 7a).

The offering circular spoke of a long-term contract for computer services with Sperry Rand but omitted mentioning the pending litigation against Sperry Rand. The dispute was [illegible] shortly thereafter (Appx. p. 7a).

---

* References "Appx. p. ___" are to the "Supplemental Joint Appendix" filed on behalf of all the parties in the Court of Appeals.

In the meantime, the offering was completed, and the plaintiffs were among the purchasers. Thereafter, the price of the stock fell, and plaintiffs brought this action on June 3, 1965 against Law Research, Hoppenfeld, and Blair. Plaintiffs alleged that the said omission from the offering circular violated sections 12(1) and (2) and 17(a) of the Securities Act of 1933 (15 U.S.C. §§771(1) and (2) and 77q(a)) and sections 10(b) and 15(c) of the Securities Exchange Act of 1934 (15 U.S.C. §§78j(b), 78o(c)) and that therefore, defendants should be liable for the losses sustained by plaintiffs (Appx. p. 7a).

Blair filed a cross-claim against Law Research based on the indemnification clause in the underwriting agreement. Blair also filed a cross-claim against Hoppenfeld, since it had relied on the false representations of Hoppenfeld in preparing the offering circular (Appx. p. 7a).

A trial was held in April 1968 in the United States District Court for the Southern District of New York before Judge Mansfield and a jury. The jury found for the plaintiffs against all defendants and awarded compensatory and punitive damages. The jury also found for Blair, and against Law Research and Hoppenfeld on the cross-claims based on the indemnification agreement. The court, however, set aside the jury verdict on the cross-claims and entered judgment for compensatory damages against "all defendants (*i.e.*, Law Research, Hoppenfeld and Blair) jointly and severally" totaling $32,591.14 plus interest (Appx. p. 8a). The opinion of Judge Mansfield is reported in *Globus* v. *Law Research Service, Inc.*, 287 F. Supp. 188 (S.D.N.Y. 1968).

The judgment was appealed to the United States Court of Appeals for the Second Circuit, which reversed the puni-

tive damage award, affirmed the joint and several damage award, and sustained the dismissal of the cross-claims of Blair. *Globus* v. *Law Research Service, Inc.*, 418 F.2d 1276 (2d Cir. 1969). The Second Circuit recognized that as between the three defendants, Blair was the least culpabl 418 F.2d at 1289. Nevertheless, the Court held that such indemnity agreements were against the policy of the Securities Acts and stated, "[T]he proper purpose of the Act is to encourage diligence, investigation and compliance with the requirements of the statute by exposing issuers and underwriters to the substantial hazard of liability for compensatory damages." 418 F.2d at 1289 (Appx. p. 9a).

Thereafter, plaintiffs made a demand that the defendants satisfy the judgment. Petitioners Hoppenfeld and Law Research refused to make any payment toward the satisfaction of the judgment. Blair made payment to plaintiffs of $36,888.59, that being the full amount of the judgment plus interest and costs. A satisfaction of the judgment was filed with the District Court by plaintiffs (Appx. p. 9a).

Blair made due demand upon Law Research and Hoppenfeld that they each contribute their pro rata share of this judgment, but they refused (Appx. pp. 15a, 16a). The motion for contribution was then brought in the District Court and came before Judge Frankel, who granted the motion. *Globus* v. *Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970) (Pet. Appx.* "B"), and entered judgment for contribution (Pet. Appx. "C"). The judgment of the District Court was then appealed by Law Research and Hoppenfeld to the United States Court of Appeals for the Second Circuit, which unanimously affirmed on the opinion below (Pet. Appx. "D").

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* References to "Pet. Appx. " are to Appendices "A", "B", "C", or "D" to the Petition for Certiorari herein.

Grounds Why the Cause Should Not Be Reviewed by This Court

The opinion of the United States District Court for the Southern District of New York in this case, unanimously affirmed by the Second Circuit herein, held that Blair, one of three co-defendants, held jointly and severally liable for damages in an action under Section 10(b) of the Securities Exchange Act of 1934 and which paid the entire joint and several judgment, may have contribution against the other co-defendants in the action.

This ruling is in accord with a prior federal court decision containing a ruling to the same effect. *deHaas* v. *Empire Petroleum Co.*, 286 F. Supp. 809 (D. Colo. 1968), *aff'd in part and mod. in part on other grounds* 435 F.2d 1223 (10th Cir. 1970). It is also in line with the fact that all sections of the Federal Securities Laws expressly providing for private civil actions also expressly provide for the right of contribution among jointly and severally liable defendants in such actions. The decisions in the present case and in *deHaas* merely extended the same principle to the judicially established right of civil action under Section 10(b) of the Securities Exchange Act of 1934, as a matter of consistency.

The decision below thus represents a clear ruling on a matter of federal law as to which there is no conflict among federal courts. It represents an application of an established principle of federal law, which does not merit review by this Court under the considerations governing review on certiorari set forth in this Court's Rule 19. This conclusion is supported by the following points:

I.

New York law does not prohibit a motion for contribution in an action under the Securities Exchange Act of 1934.

The petition for certiorari herein relies strongly on the contention that the decision below conflicts with New York law. Aside from the obvious point that New York law does not apply in an action under the Federal Securities Laws, the premise of the contention is unsound.

The motion for contribution below, made in this action where the joint and several judgment was rendered, was brought in accordance with Section 1401 of the New York Civil Practice Law and Rules which provides for contribution by motion among joint tort-feasors.

Petitioners contend that Section 1401 of the Civil Practice Law and Rules "does not apply to a judgment for fraud and deceit" (Pet. p. 9).

It is submitted, however, that an action under Section 10(b) of the 1934 Act is not one for "fraud and deceit" within the meaning of the New York decision cited. The alleged New York rule prohibiting contribution for fraud and deceit is based on a common law concept of "fraud". However, reference to "fraudulent" conduct is wholly inappropriate in the context of an action under the Federal Securities Laws, because a showing of intentional fraud of moral turpitude is not a requirement under these laws. See *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 855 (2d Cir. 1969) wherein the Second Circuit stated that Section 10(b) implements "a standard of conduct that encompasses negligence as well as active fraud".

Thus, reference to intentional or fraudulent conduct in terms of the traditional norms of the common law have no application to the present case, arising as it does under the Federal Securities Laws. Section 1401 of the New York Civil Practice Law and Rules (see Pet. Appx. "A" p. 15) which expressly permits contribution to be sought from joint tort-feasors by motion in an "action . . . for property damage", supports, and surely cannot be claimed to bar, the recovery of contribution in the instant case.

II.

The Courts have permitted a right of contribution, even without statutory authority.

The petition argues that the right to contribution should not exist in the absence of specific legislation. Even if there were no legislative support for the granting of contribution herein (but see Point III, *infra*), such an assertion is at odds with the general trend of the law today.

Blair is entitled to contribution from Hoppenfeld and Law Research, fundamentally, because this is equitable and fair. The recognition of the essential fairness of upholding a right of contribution among joint tort-feasors has led both federal and state courts to change the ancient common law bias against such a right, even without legislative alteration. As the Court of Appeals for the Third Circuit stated in *Gomes* v. *Brodhurst,* 394 F.2d 465, 467-468 (3rd Cir. 1968):

> "The . . . question is whether a right of contribution generally exists among joint tort-feasors. That no such right is recognized at common law has long been clear

> . . . . After extended consideration, however, we have decided that there is no compelling reason to defer or deny applying what we deem a rule of reasoned fairness. There is no longer a legitimate place in our system, if, indeed, there ever was, for a rule of law which places the full burden of restitution upon one who is only in part responsible for a plaintiff's loss. Such a philosophy stems from a more ancient day which more easily intermingled penal and compensatory considerations. See generally Prosser, Torts §47 (3d ed. 1964)."

Both of the courts below expressly reviewed and relied upon many other recent cases which have recognized the essential fairness of judicially allowing contribution among joint tort-feasors even in the absence of legislation expressly changing the old contrary common law doctrine. (See Pet. Appx. "B" pp. 19-20, citing decisions and other authority.)

III.

The Federal Securities Laws, and the Court decisions thereunder, uniformly support the right to contribution in this case.

Although petitioners also contend that there is no federal legislation permitting contribution in this case, Blair's right to contribution from Hoppenfeld and Law Research is supported by the uniform provisions of, and decisions under, the various Federal Securities Laws. The various sections of the Federal Securities Laws which expressly provide for civil liability, also expressly provide for contribution. See section 11 of the Securities Act of 1933 (15 U.S.C. §77k), sections 9 and 18 of the Securities Exchange Act of 1934 (15 U.S.C. §§78i, 78r).

The joint and several judgment in the present case was based only upon violations of section 17(a) of the 1933 Act and 10(b) of the 1934 Act (15 U.S.C. §§77q(a) and 78j(b)). These sections do not specifically provide for civil liability and accordingly do not specifically provide for contribution.

However, the courts which have implied civil liability for violations of these sections, have also, on the basis of consistency, implied a right to contribution. Thus, in the case of *deHaas* v. *Empire Petroleum Co., supra,* the court on this point said:

> "[T]hose sections of the [securities acts] which expressly provide for civil liability contain express provisions for contribution among intentional wrongdoers. [citing §11 of the 1933 Act, 15 U.S.C. §77k and §§9

and 18 of the 1934 Act, 15 U.S.C. §§78i and 78r.] Since the specific liability provisions of the Act provide for contribution, it appears that contribution should be permitted when liability is implied under Section 10(b). III Loss, Securities Regulation 1739-40, n. 178 (1961)." 286 F. Supp. at 815-16.

Agreeing with *deHaas,* Judge Frankel and the Second Circuit held here, as an additional reason for granting contribution to Blair, that the Securities Laws are to be read together: "This is simply a pertinent application of the general principle that the two statutes are to be administered *in pari materia*" (Pet. Appx. "B", p. 20).

IV.

The decision below gives proper recognition to the need for sound enforcement policies in civil actions under the Federal Securities Laws as against all defendants therein.

In an earlier decision in the present case, *Globus* v. *Law Research Service, Inc.,* 418 F.2d 1276 (2d Cir. 1969), *cert. den.* 397 U.S. 913 (1970) the Second Circuit established the salutary principle that in order to promote compliance with the Federal Securities Laws, enacted to protect the public, all wrongdoers charged with violations thereof must bear their respective share of the statutory liabilities. As the Second Circuit stated:

" . . . [T]he proper purpose of the Act is to encourage diligence, investigation and compliance with the requirements of the statute by exposing issuers and underwriters to the substantial hazard of liability for compensatory damages" (418 F.2d at 1289).

The decisions below recognize that the ruling on contribution, sought to be reviewed on the present appeal, carries out this salutary purpose, and serves the need for promoting compliance on the part of all charged with violation of the public interest provisions of the Federal Securities Laws.

CONCLUSION

The decision of the Second Circuit and of the District Court sought to be reviewed on the petition for certiorari herein, represents such a clear application of established and appropriate legal principles under the Federal Securities Laws that no review thereof by this Court is necessary or appropriate under Rule 19. The petition for certiorari should be denied in all respects.

Respectfully submitted,

MILTON BLACK, of
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20 Broad Street
New York, New York 10005
Attorneys for Respondent,
Blair & Co., Granbery Marache
Incorporated

Of Counsel:
THOMAS R. ESPOSITO

Dated: October 13, 1971

Certificate of Service

I, MILTON BLACK, of Mudge Rose Guthrie & Alexander, hereby certify that copies of the foregoing Brief in Opposition to Petition for Certiorari on Behalf of Respondent Blair & Co., Granbery Marache Incorporated, have been served on counsel by mailing copies by United States mail, postage prepaid, to Gabriel I. Levy, Esq., Counsel for Petitioners, 350 Fifth Avenue, New York, New York, 10001, this 13th day of October, 1971.

MILTON BLACK

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-372

LAW RESEARCH SERVICE, INC. and
ELLIAS C. HOPPENFELD,
Petitioners,

against

BLAIR & CO., GRANBERY MARACHE,
INCORPORATED,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

On October 26, 1971, this Court granted certiorari in the case of *Atlantic Coast Line Railroad Company* v. *Erie Lackawanna Railroad Company* (No. 71-107).

The main question presented in the *Atlantic Coast Line* case is whether or not this Court should establish a right to contribution between joint tortfeasors under maritime common law in non-collision cases. The question presented on the instant petition for certiorari is whether or not there is a right to contribution between intentional joint tortfeasors who have violated a federal statute, when the statute so violated makes no provision for contribution.

In both cases there is also presented the question that since there is no federal statute providing for contribution should the Court look to the state statute to determine whether or not a right of contribution exists between the joint tortfeasors.

Thus, substantially the same question is presented in both cases. In the *Atlantic Coast Line* case this Court is called upon to determine whether or not a court exercising maritime jurisdiction may fashion a new rule of judicial contribution whereas in the instant case this Court is called upon to determine whether or not a court exercising common law jurisdiction may fashion a new judicial rule of contribution, when in both instances Congress has acted in the field but has refrained from enacting legislation which directs contribution between joint tortfeasors applicable to these cases.

The similarity between the two cases does not end here. Both were recently decided by the Second Circuit with Judges Moore and Timbers comprising a majority of the court in both cases, which reached diametrically opposite results. In *Atlantic Coast Line* the Court of Appeals refused to direct contribution between joint tortfeasors under maritime law on the grounds that you held in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 285-87 (1952), that there is no contribution between joint tortfeasors because Congress while acting in the field has stopped short of approving the rule of contribution urged and that it would be inappropriate to fashion a new judicial rule of contribution. In the instant case, both the District Court and the Court of Appeals completely ignored the fact that you held in *Halcyon* that "courts exercising jurisdiction in maritime affairs have felt freer than common law courts in fashioning rules" (342 U. S. at 285) yet approved the fashioning of a new judicial

rule of contribution between joint tortfeasors in this case, wherein the Court was exercising a common law jurisdiction, whereas in *Atlantic Coast Line* it refused to fashion a new judicial rule of contribution in a case arising under the court's maritime jurisdiction, although it stated that "Atlantic's contribution claim, so far as the equities are concerned, is appealing."

It would appear that by your granting certiorari in the *Atlantic Coast Line* case you are at least prepared to reevaluate your holding in *Halcyon* that you would not fashion a new judicial rule of contribution under maritime law and that solution of the problem should await Congressional action. The granting of certiorari in this case would also afford the Court the opportunity, in making such reevaluation, to determine whether or not you are prepared to fashion a new judicial rule of contribution between joint tortfeasors when the case arises under a common law jurisdiction, especially in view of the fact that as you pointed out in *Halcyon*, 342 U. S. at 285, that "[i]n the absence of legislation courts exercising a common law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors" and that "courts exercising jurisdiction in maritime affairs have felt freer than common law courts in fashioning [such] rules". Since you are apparently prepared to settle this important question under maritime law you should also at the same time afford yourself the opportunity of settling the same important question for the guidance of courts exercising a common law jurisdiction.

Furthermore, there is the question which has arisen in both the *Atlantic Coast Line* case arising under maritime law and the instant case arising under the common law as to whether or not your holding in *Halcyon*, 342 U. S. at

285, that "because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so" leaves a void in federal law respecting contribution which a Federal Court is free to fill by the adoption of a state contribution statute or does that holding made by you in *Halcyon* that since much Congressional legislation is already in existence in both the maritime area involved in *Atlantic Coast Line* and the securities law area involved in the instant case and whether Congress by acting in both fields has preempted the field to the exclusion of the states and that Congress' refusal to act forbids any contribution whatsoever between joint tortfeasors.

Conclusion

In view of the foregoing and the reasons relied on for allowance of the writ set forth in the petition herein, it is urged that the Petition for a Writ of Certiorari in this case should be granted and that this case should be heard by this Court in conjunction with the case of *Atlantic Coast Line Railroad Company* v. *Erie Lackawanna Railroad Company* (No. 71-107), so that these important questions may be settled by this Court, not only for courts exercising maritime jurisdiction, but also for courts exercising common law jurisdiction.

Dated: New York, New York
November 1, 1971

Respectfully submitted,

GABRIEL I. LEVY,
Attorney for Petitioners.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-372

LAW RESEARCH SERVICE, INC.
and ELLIAS C. HOPPENFELD,

Petitioners,

—against—

BLAIR & CO., GRANBERY MARACHE, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI ON BEHALF OF RESPONDENT BLAIR & CO., GRANBERY MARACHE, INC.

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Of Counsel:

THOMAS R. ESPOSITO

Dated: November 5, 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

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LAW RESEARCH SERVICE, INC.
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Contrary to the assertions made in petitioners' Supplemental Brief, the case of *Atlantic Coast Line Railroad Company* v. *Erie Lackawanna Railroad Company* (No. 71-107), in which this Court granted certiorari on October 26, 1971, does not raise an issue similar to the issue herein.

The *Atlantic Coast Line* case involves the question of contribution among joint tort-feasors under maritime common law. As petitioners' Supplemental Brief acknowledges, this question turns solely on judicial interpretation "in the absence of legislation" (Pet. Supplemental Brief, p. 3).

The present case, however, involves the granting of contribution among joint tort-feasors in an action under the

authority of the federal securities laws. As pointed out in our Brief in Opposition, these laws encompass a scheme of federal legislation which supports the granting of contribution herein (Brief in Opposition, pp. 9-10). The Courts below expressly relied on the provisions of these federal laws in holding that contribution is here mandated under them (Pet. Appx. "B," p. 20).

Unlike *Atlantic Coast Line*, this is not a case of a court establishing the right of contribution in a common law situation without Congressional sanction. Congress has expressly provided for contribution among defendants in actions under the federal securities laws. The difference between the two cases is underscored by the fact that the same majority of the Second Circuit (Judges Moore and Timbers) denied contribution in the *Atlantic Coast Line* case, but granted it in the instant case. See 442 F.2d 694 (2nd Cir. 1971), but cf. 442 F.2d 1346 (2nd Cir. 1971).

CONCLUSION

For the foregoing reasons, as well as those set forth in our Brief in Opposition, the petition for certiorari should be denied in all respects.

Respectfully submitted,

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Of Counsel:

THOMAS R. ESPOSITO

Dated: November 5, 1971

CERTIFICATE OF SERVICE

I, MILTON BLACK, of Mudge Rose Guthrie & Alexander, hereby certify that copies of the foregoing Supplemental Brief in Opposition to Petition for Certiorari on Behalf of Respondent Blair & Co., Granbery Marache Incorporated, have been served on counsel by personal delivery to Gabriel I. Levy, Esq., Counsel for Petitioners, 350 Fifth Avenue, New York, New York 10001, this 5th day of November, 1971.

MILTON BLACK